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In the Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL LIQUOR CO
~~ROBERT Z. NAIFEH~~, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
SANFORD M. LITVACK
Assistant Attorney General
BARRY GROSSMAN
BRUCE E. FEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether a pretrial order denying a motion to dismiss an indictment is appealable immediately under the "collateral order" exception to the final judgment rule when an individual partner raises a claim of double jeopardy premised on the theory that he is legally indistinguishable from a partnership that is his co-defendant.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ... 2, 3, 4, 5, 6, 8

Cobbledick v. *United States*, 309 U.S. 323 3

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 2

Crist v. *Bretz*, 437 U.S. 28 6

Launius v. *United States*, 575 F.2d 770 8

Menna v. *New York*, 423 U.S. 61 6

Moroyoqui v. *United States*, 570 F.2d 862, cert. denied, 435 U.S. 977 8

Parr v. *United States*, 351 U.S. 513 3

United States v. *A & P Trucking Co.*, 358 U.S. 121 9

United States v. *Alessi*, 536 F.2d 978..... 6, 7

United States v. *Griffin*, 617 F.2d 1342 7

United States v. *MacDonald*, 435 U.S. 850 ..... 3, 5, 6, 8

United States v. *Rumpf*, 576 F.2d 818, cert. denied, 439 U.S. 983 8

Western Laundry & Linen Rental Co. v. *United States*, 424 F.2d 441, cert. denied, 400 U.S. 849 9

Constitution and statutes:

United States Constitution:

Fifth Amendment, Double Jeopardy Clause 1, 4, 6, 7, 8

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Constitution, and statutes,—Continued: Page

Sixth Amendment, Speedy Trial Clause .. 8

Sherman Act, Section 1, 15 U.S.C. 1 1

Speedy Trial Act of 1974, 18 U.S.C. 3161 8

28 U.S.C. 1291 ..... 2, 8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–3 to A–8) is not yet reported. The opinion and order of the district court (Pet. App. A–11 to A–12) are unreported. The prior opinions of the district court and court of appeals (Pet. App. A–15 to A–17 and A–19 to A–20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1980. The petition for a writ of certiorari was filed on October 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1978 a federal grand jury indicted petitioners for price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioners Central Liquor Company and Jarboe Sales Company are partnerships with annual sales of approximately $20 million. Petitioners Louis Abraham, Jr. and Robert Z. Naifeh are partners in Jarboe Sales and Central Liquor, respectively. Prior to empanelling a jury, Abraham and Naifeh moved to dismiss the charges against them, contending that the Double Jeopardy Clause precludes separate Sherman Act charges against an individual partner and a partnership stemming from the same criminal episode. The district court denied the dismissal motions (Pet. App. A–19 to A–20), the court of appeals refused to entertain petitioners' interlocutory appeals because jeopardy

had not yet attached (*id.* at A-15 to A-17), and this Court denied petitions for certiorari following that ruling (444 U.S. 866 (1979)).

In November 1979, a jury panel was selected and sworn. Naifeh and Abraham then renewed their double jeopardy challenge to the indictment. The district court denied their dismissal motions once again (Pet. App. A-11 to A-12), and a unanimous court of appeals dismissed interlocutory appeals for lack of jurisdiction (*id.* at A-3 to A-8). The court of appeals explained that interlocutory review of a pretrial ruling in a criminal case is authorized by 28 U.S.C. 1291 only if the ruling constitutes a "collateral order" as described in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (Pet. App. A-5). The court recognized that *Abney* v. *United States*, 431 U.S. 651 (1977), applied the "collateral order" doctrine to permit interlocutory review of a double jeopardy claim raised before commencement of trial on charges that already had been tried. The court of appeals relied, however, on the fact that no question of repetitive trials is involved in the present case, and that petitioners' right to be free from duplicative convictions for the same offense can be fully vindicated by appeal from a final judgment (Pet. App. A-6 to A-7). The court of appeals also concluded that petitioners were not entitled to immediate appellate review of their claim that the charges brought against them improperly exposed them to additional expense and increased trial complexity. The court explained that "expense for attorneys does not create a multiple prosecutions situation" (*id.* at A-8). It also noted that, since the partners and partnerships were charged with offenses resulting

from the same course of conduct, adjudication of those charges in a single proceeding would not materially increase the complexity of the trial (*ibid.*).[1]

ARGUMENT

The decision of the court of appeals, on which we essentially rely, is correct and does not conflict with any decision of this Court or any court of appeals. Further review by this Court, which would cause additional delay of a criminal prosecution that has already been too long delayed, is therefore unwarranted.

1. Petitioners contend (Pet. 7–15) that the decision of the court of appeals denying interlocutory review of their double jeopardy claims conflicts with *Abney* v. *United States*, 431 U.S. 651 (1977). There is no merit to this assertion.

As a general matter, orders denying motions to dismiss indictments may not be appealed before final judgment. *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978); see also *Parr* v. *United States*, 351 U.S. 513, 518–521 (1956); *Cobbledick* v. *United States*, 309 U.S. 323, 324–325 (1940). In *Abney*, however, this Court recognized that a decision rejecting a double jeopardy defense may be appealed on an interlocutory basis when the decision satisfies the requirements of the "collateral order" exception to the final judgment requirement. A threefold showing must be made: first,

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[1] Although the indictment in this case was returned in 1978 and the jury was selected in 1979, the district court has stayed the case indefinitely pending completion of appellate proceedings concerning petitioners' pretrial double jeopardy claims (Pet. App. A-1 to A-2).

the order must constitute a complete, formal and final rejection of the double jeopardy claim; second, the claim must be collateral to and separable from the issues to be resolved at trial; and third, there must be a danger that the interests protected by the Double Jeopardy Clause would be "significantly undermined" if appellate review were postponed (431 U.S. at 658–661).

Applying this three-part test, the Court held in *Abney* that a pretrial order rejecting a double jeopardy defense to the retrial of an indictment was immediately appealable. The Court emphasized that the outcome of the second trial would have no bearing on the resolution of the double jeopardy claims raised by the defendant, and that the constitutional interests protected by the prohibition against multiple prosecutions of a single offense would be defeated if appellate review were withheld until the second trial was completed (431 U.S. at 661). Significantly for present purposes, however, the Court emphasized that the Double Jeopardy Clause's protection "against being twice convicted for the same crime * * * can be fully vindicated on an appeal following final judgment" (*id.* at 660), and added that the "special considerations * * * which justify a departure from the normal rule of finality * * * do not extend beyond the claim of former jeopardy" (*id.* at 663).

The factors that led the Court to apply the collateral order doctrine in *Abney* are wholly absent in this case. In contrast to the defendant in *Abney*, petitioners have not yet been tried. They are asserting double jeopardy claims to forestall their original trial, not to avoid a repetitive trial. Moreover, unlike the situation

in *Abney*, petitioners' double jeopardy claims are premature and cannot be evaluated prior to the resolution of proceedings in the district court. For example, the jury may acquit all of the defendants, thereby removing the possibility of even a single conviction and punishment. For that matter, if the jury were to convict the partners, but not the partnership, no question of double convictions would arise. And even if all defendants were convicted, the imposition of punishment on the partners alone, or the partnerships alone, would remove any issue of cumulative penalties. Thus, the double jeopardy defense that petitioners seek to litigate on appeal is not wholly collateral to and separate from the resolution of the issues to be determined at trial. "[T]he question at stake in the motion to dismiss necessarily 'remains open, unfinished [and] inconclusive' until the trial court has pronounced judgment." *United States* v. *MacDonald, supra*, 435 U.S. at 859. "Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed." *Id.* at 861. And if petitioners are improperly subjected to cumulative penalties following the completion of their trial,[2] "post-conviction appeals would be totally effective in protecting [their] rights" (Pet. App. A-7).

Although petitioners complain that simultaneous prosecutions of partners and partnerships will expose them to additional expense and trial complexity, these

[2] We do not, of course, concede that separate penalties for the partner and the partnership, if both are convicted, would constitute impermissible multiple punishment for a single offense or offender.

simultaneous prosecutions certainly do not force petitioners to "endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney* v. *United States*, *supra*, 431 U.S. at 661.[3] Rather than being "forced to 'run the gauntlet' a second time before an appeal could be taken" (*id.* at 662), petitioners are required by the decision of the court of appeals here simply to defend themselves in a single trial and to present their claims on appeal following a final judgment. As the court of appeals explained (Pet. App. A-8): "Any trial is an ordeal, but defendants may not escape a single trial through application of the double jeopardy clause." Moreover, as the court of appeals also pointed out (*ibid.*), the charges in this case stem from a single series of events and joinder of the defendants should not materially affect the complexity of the trial. This is *a fortiori* true if, as petitioners assert, individual partners are indistinguishable from their co-defendant partnerships.[4]

2. Petitioners also rely (Pet. 7) on *United States* v. *Alessi*, 536 F.2d 978, 979-981 (2d Cir. 1976), and

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[3]The value to a defendant of avoiding legal expenses by winning before, rather than after, the completion of trial does not justify interlocutory review, even of constitutional claims. See *United States* v. *MacDonald*, *supra*, 435 U.S. at 860 n.7.

[4]Petitioners' reliance (Pet. 7) on *Crist* v. *Bretz*, 437 U.S. 28 (1978), and *Menna* v. *New York*, 423 U.S. 61 (1975), is without basis. *Crist* held that jeopardy attaches when a jury is sworn. *Menna* held that a plea of guilty to a charge that violates the Double Jeopardy Clause does not prevent the defendant from subsequently raising a double jeopardy challenge to the conviction. Neither case considered the issue of interlocutory appealability decided by the court below.

United States v. *Griffin*, 617 F.2d 1342, 1343–1346 (9th Cir. 1980). While we have serious doubts about the correctness of those decisions, neither conflicts with the decision here. In *Alessi*, an indicted defendant moved to dismiss charges that the government purportedly had agreed to forego pursuant to a plea bargain. The Second Circuit held that the order denying the dismissal motion was immediately appealable under the collateral order doctrine. The court reasoned that the Due Process Clause protects a defendant against trial on charges that the government previously agreed to drop in return for a guilty plea on other charges. That protection would be irretrievably lost, the court reasoned, if interlocutory review were denied. The defendant's interest in avoiding a second prosecution in these circumstances was deemed to be akin to the interest of a defendant seeking to avoid a retrial of charges barred by the Double Jeopardy Clause. In the present case, in contrast to *Alessi*, petitioners have not been convicted on any charges following a guilty plea, and have not received a promise from the prosecutor that they will be free from prosecution on the present charges.

In *United States* v. *Griffin*, *supra*, the Ninth Circuit held that an order denying a motion to dismiss an indictment on grounds of prosecutorial vindictiveness was immediately appealable. The right to avoid trial on charges obtained in retaliation for the exercise of a procedural right would be irretrievably lost, the court reasoned, if the defendant were forced to await the outcome of trial before seeking review. In this case, unlike *Griffin*, no prosecutorial vindictiveness is or could be alleged, and the double jeopardy interests

that petitioners assert can adequately be protected after trial proceedings are concluded.[5]

3. The decision of the court of appeals correctly balances two competing interests under 28 U.S.C. 1291. The rule of "finality" weighs heavily against interlocutory appeals in recognition of the strong public interest in the expeditious completion of criminal trials. That interest is embodied in the Speedy Trial Clause of the Sixth Amendment (*United States* v. *MacDonald*, *supra*, 435 U.S. at 861–862) and the Speedy Trial Act of 1974 (18 U.S.C. 3161). As the Court explained in *MacDonald*, "[t]he rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law' " (435 U.S. at 853–854). This case illustrates the importance of the doctrine of finality. Following their indictment in 1978, petitioners have

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[5]The other court of appeals decisions relied on by petitioners are entirely irrelevant to the issue presented in this case. *United States* v. *Rumpf*, 576 F.2d 818 (10th Cir.), cert. denied, 439 U.S. 893 (1978), held that a notice of appeal from a pretrial order denying a double jeopardy claim (asserted prior to *Abney* v. *United States*, *supra*) did not divest the district court of jurisdiction to try the charges in the indictment, at least in the absence of any request for a continuance or delay pending resort to the court of appeals. *Moroyoqui* v. *United States*, 570 F.2d 862 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978), concluded that an appeal from an order denying a double jeopardy claim stripped the trial court of power to proceed with the trial. Neither of these cases considers the question whether a double jeopardy claim of the kind presented in this case is subject to immediate appeal. *Launius* v. *United States*, 575 F.2d 770 (9th Cir. 1978) held only that unauthorized cumulative punishments for the same offense are impermissible under the Double Jeopardy Clause regardless of whether they are imposed simultaneously or sequentially.

taken two appeals to the court of appeals and have sought certiorari in this Court on both occasions. A jury was selected and sworn approximately one year ago, but the trial has not yet commenced because of petitioners' repetitive pretrial appeals.

On the other hand, the collateral order doctrine has a limited role to play in permitting interlocutory appeals from orders that cannot effectively be reviewed following final judgment without a significant impairment of the constitutional right asserted by the defendant. In present circumstances, not only is it possible to review petitioners' double jeopardy claims after final judgment without sacrificing any substantial right, but it also is clear that meaningful analysis of those claims must await the district court's adjudication of petitioners' guilt or innocence and its determination of what sentence (if any) is appropriate in this case. Under these circumstances, the court of appeals correctly declined to depart from the rule of finality.[6]

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[6] Petitioners' discussion of the merits of their double jeopardy theory (Pet. 18-23) has no bearing on the jurisdictional question decided by the court of appeals. In any event, we note that *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958), relied on by petitioners, lends no support to their contentions on the merits. The Court's opinion indicates that partners and partnerships may be held separately accountable for criminal violations so long as each defendant is shown to be responsible for committing the elements of the alleged offense (358 U.S. at 126-127). See *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir.), cert. denied, 400 U.S. 849 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys

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